88-472

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALFRED G. BIBERFELD, and SURGICAL INSTRUMENT COMPANY OF AMERICA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Can the Petitioners properly be convicted of wire fraud for allegedly misleading the government to believe that goods were produced in favored geographic areas, when *McNally v. United States*, ___ U.S. ___, 107 S. Ct. 2875 (1987), holds that wire fraud prosecutions are proper only to protect property interests?

2. Were the Petitioners unconstitutionally deprived of a right of "fair warning" when convicted based on a clause in a contract with the United States when their interpretation was supported by decisions of the U.S. Court of Claims and the U.S. General Accounting Office, by the regulatory body responsible for the contract clause in question, and by expert testimony?

PARTIES BELOW

The parties below, as shown in the caption of this case, are Alfred G. Biberfeld, Surgical Instrument Company of America and the United States of America. Surgical Instrument Company of America has no subsidiaries or affiliates.

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UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, ALFRED G. BIBERFELD and SURGICAL INSTRUMENT COMPANY OF AMERICA, pray for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Third Circuit denying the Petitioners' appeal is set forth at App. A-1. The Third Circuit denial of the Petitioners' Petition for Rehearing is set forth at App. A-10.

JURISDICTION

The opinion of the U.S. Court of Appeals for the Third Circuit denying the Petitioners' appeal from convictions of the U.S. District Court for the District of New Jersey was entered on June 16, 1988. A timely Petition for Rehearing was denied on August 12, 1988.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Fifth Amendment, United States Constitution:

> No person shall be deprived of life, or property, without due process of law; . . .

18 U.S.C. § 1343:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Alfred G. Biberfeld, the 64-year old President and sole owner of Surgical Instrument Company of America, and Surgical Instrument Company of America (the "Petitioners") were charged in a 12 count indictment with disguising the fact that work on the medical instruments that they were selling to the United States was performed in part in Pakistan.

The Petitioners do not dispute that their subcontractor in West Germany in turn subcontracted certain work to a Pakistani company, and that they did not disclose this Pakistani sub-subcontractor to the United States. The Government acknowledges that the West German subcontractor was fully disclosed. The Government contends, however, that disclosure of the Pakistani sub-subcontractor was required because bids for Pakistani made goods were subject to a penalty when compared with American or NATO country goods under the Buy American Act. The Petitioners alleged acts to conceal this Pakistani connection led to four counts of wire fraud, five counts of making a false statement in a matter within the jurisdiction of the United States, two counts of false claims, and one count of conspiracy to defraud the United States.

The Petitioners filed motions at trial to strike counts in the indictment, for acquittal, for a directed verdict, and for jury instructions. The grounds for these motions were, *inter alia*, that (a) under *McNally v. United States*, ___U.S. ___, 107 S.Ct. 2875 (1987), announced the day before the Petitioner's trial began, the Wire Fraud Statute could not be invoked to prosecute conduct that at worst deprived the United

States of its interest in limiting manufacturing activity to certain geographic areas;[1] and (b) the legal requirement to disclose a sub-subcontractor was doubtful and therefore as a matter of law could not meet the specific intent or materiality requirements of the criminal statutes under which the prosecution proceeded.

The trial judge denied these motions. He instructed the jury that to convict on the wire fraud counts it needed to find that "there was a scheme or artifice to defraud *or* to obtain money or property by false and fraudulent pretenses, presentations or promises, as alleged in the Indictment . . . . To act with 'intent to defraud' means to act knowingly with specific intent to deceive, *ordinarily* for the purpose of either causing some financial loss to another, or bringing about some financing gain to oneself." Apps. A-12, A-13 (emphasis added). He further instructed the jury that he had determined that "all the places where work on the surgical instruments would be performed" had to be listed and that failure to provide such a listing was a material matter. App. A-14.

Thus instructed, the jury returned a guilty verdict on all counts. In addition to maximum fines for each petitioner on each count, Mr. Biberfeld was sentenced to five years of concurrent imprisonment on 11 of the counts, with three years of probation to run consecutively on one of the wire fraud counts.

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[1] *McNally* involved the Mail Fraud Statute, 18 U.S.C. § 1341, while this case involves the Wire Fraud Statute, 18 U.S.C. § 1343. It is accepted that these two statutes are construed identically with respect to the issues raised by *McNally*. *Carpenter v. United States*, ___ U.S. ___, 108 S. Ct. 316, 320, N. 6 (1987).

A timely appeal reiterated the Petitioners' contentions to the Third Circuit Court of Appeals. That court held that *McNally* did not apply because the "goal of the scheme as alleged . . . was to obtain government contracts by fraud and to thereby obtain money—i.e. contract payments—from the government by fraud." App. A-7. The Third Circuit panel further held that disclosure of even sub-subcontractors was "unambiguously required" by the contract documentation "on its face." App. A-7. Thus, the panel sustained the convictions. A Petition for Rehearing was denied, and this Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONTRADICTS THIS COURT'S DECISION IN MCNALLY V. UNITED STATES

A. McNally Holds that a Wire Fraud Prosecution Cannot be Sustained in Cases that Do Not Protect Property Rights

The *McNally* opinion was announced by this Court on June 24, 1987, the day before the Petitioners' trial began. In that case, this Court reversed convictions under 18 U.S.C. § 1341 (the Mail Fraud Statute) on the ground that this statute was "limited in scope to the protection of property rights." 107 S. Ct. at 2881. This was because "the mail fraud statute . . . had its origin in the desire to protect individual property rights, and any benefit which the Government desires from the statute must be limited to the Government's interest as a property holder." 107 S. Ct. at 2881 n. 8.

The defendants in *McNally* were charged with using the mails as a part of a scheme by which state insurance officials awarded contracts to a company with an understanding that the officials would in turn benefit from the allocation of commissions to companies in which they had an interest. Writing for a seven to two majority (with Justices Stevens and O'Connor dissenting), Justice White held that this did not provide a sufficient basis for a mail fraud prosecution. This was because:

> [T]here was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property. It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance.

107 S. Ct. at 2882.

B. The Convictions in This Case May Rest On Petitioners' Alleged Interference With The Government's Right to Allocate Contracts to American and German Producers; That is not a Deprivation of Money or Property

In a one paragraph analysis without citation of authority, the panel below refused to apply this precedent to Petitioners' case. In its view, *McNally* did not apply because here the "scheme as alleged in the Indictment and as explained by the district judge to the jury, was to obtain government contracts by fraud and thereby to obtain money—i.e. contract payments—from the government by fraud." App. A-7.

This criterion—the presence or absence of money as a goal of the alleged conspiracy—is not, however, the criterion of *McNally*. To the contrary, in *McNally*

the defendants indubitably sought and obtained profit. *McNally* directs a focus on the victim's losses, not on the alleged perpetrator's gains. The critical question is not one of motive, but rather of injury or potential injury. *McNally* involved intangible rights not because the defendants sought an intangible benefit—their gains were tangible enough—but because they did not deprive the state of a tangible property benefit. As this Court said:

> Indeed, the premium for insurance would have been paid to some agency, and what Hunt and Gray did was to assert control that the Commonwealth might not otherwise have made over the commissions paid by the insurance company to its agent.

107 S. Ct. at 2882 (footnote omitted).

The similarity between the instant case and *McNally* is indicated by the appellate panel's analysis earlier in its opinion. The information alleged to be disguised by the Petitioners was, according to the panel (and the district court before it), to be "used to assess the competitive position of the bidder with respect to the Buy America Act preference." App. A-2.[2] A theory frequently stated by the prosecution

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[2] Tracking the language of the government's brief, the panel opinion adds: "Moreover, information supplied in response to the place of performance clause is used to determine a firm's responsibility and its ability to meet the DLA's specific needs." App. A-3. As noted in Part II below, this argument does not compel the disclosure of a subcontractor at the time of contract award. Even if it did, however, the fact that the jury could have relied on the Buy American theory to find Petitioners guilty of wire fraud warrants reversal. *See United States v. Shelton*,

at trial was that the Petitioners disclosed a West German subcontractor, but not the West German company's Pakistani subcontractor, because under an agreement between the United States and West Germany, the West German subcontractor was placed on an equal footing with American bidders for Buy American purposes.

The Buy American Act, 41 U.S.C. § 10, signed into law on the last day of the Hoover Administration, was not designed to afford the U.S. Government any tangible property benefits. To the contrary, it provides a preference for domestic bidders when their bids are compared with foreign bidders. When a Buy American Act preference applies and a bid for U.S. manufactured goods is compared with a bid for Pakistani manufactured goods, the U.S. bidder wins even if his bid is as much (in defense department contracts) as 50 percent above the bid of the Pakistani competitor.[3] Thus, if a U.S. manufacturer bids $1.50 and

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848 F.2d 1485, 1496 (10th Cir., *en banc*, 1988) (citing *McNally*): "The jury here, as in *McNally*, was thus not required to find that the victim suffered pecuniary loss. Consequently, 'the jury instruction on the mail fraud count permitted a conviction for conduct not within the reach of § 1341.' " *See also United States v. Alexander*, 850 F.2d 1500, 1503 (11th Cir. 1988): "While it is likely that the jury found that the defendants were involved in a scheme to obtain money, it remains possible that the jury found the defendants guilty under the theory struck down in *McNally*. The instruction explicitly provided the jury with that alternative. We therefore reverse the defendants' convictions . . . ."

[3] Under an international agreement, the United States treats West German goods on a par with U.S. goods for purposes of administering the Buy American Act. This is why it is alleged to be significant that the Petitioners did not record Pakistani

the Pakistani manufacturer bids $1.00, the award goes to the U.S. manufacturer.

This statutory scheme does not afford the United States any financial advantage. To the contrary, it is never to the financial advantage of the United States to give a preference to a more expensive domestic bidder over a cheaper foreign bidder. This policy is pursued only because it protects the intangible, political interest of the United States in encouraging domestic production.

Insofar as violations of the Buy American Act were effected, as the prosecution alleged, by a wire fraud, those violations would actually have saved the United States money. The indictment does not allege and the jury was not asked to find that the Petitioners failed to provide, or conspired to avoid providing, quality products at lower prices than any of their competitors.[4]

Thus, the situation is like that in *McNally* where "[i]t was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance." 107 S.

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subcontract work, but instead listed only a West German manufacturer.

[4] One paragraph in the indictment, Paragraph 19 of Count 1 (incorporated by reference in the Wire Fraud Counts) asserted that "It was further part of said conspiracy [to defraud, an alleged violation of 18 U.S.C. § 371] that defendants . . . tendered surgical instruments to the DLA and VA as complying with the contract specifications, when they know full well the instruments did not conform to [government] requirements." The evidence at trial, however, supported this paragraph by reference to Petitioners' alleged misstatements as to the place of performance of the contract.

Ct. at 2882. It is also like that in several circuit court cases where rights similar to the Buy American policy at issue here were held not to warrant a mail or wire fraud conviction because they did not involve money or property. In *United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988), for example, the Court of Appeals held that the use of false statements to subvert a state's right to license bingo games to charitable organizations was not a deprivation of a money or property within the meaning of *McNally*. That court's opinion correctly stated that "recent decisions of the Fifth and Seventh Circuit, in the wake of *McNally*, underscore the proposition that a mail fraud prosecution is limited to allegations of fraud involving money or property." 836 F.2d at 250-51.

The indictment in this case differed from that in *McNally* and several other cases in that it did not allege the deprivation of intangible property rights, but instead spoke of the deprivation of money or property. The proof at trial, however, was directed in substantial measure to demonstrating a deprivation of an intangible property right. Since the jury was only charged that an intent to deceive "ordinarily" must be for the purpose of causing some financial loss, Apps A-12, A-13, and was not instructed that it must find a loss of money or property, the prosecution in this case and the Petitioners' convictions suffer from the defect identified in *McNally*. After *McNally*, a wire fraud conviction cannot rest on conduct alleged to deprive the government of its right to favor American (and NATO) producers under the Buy American Act.

C. The Proper Interpretation of the McNally Opinion is an Important and Urgent Question for this Court

The issue raised by the appellate panel's misconstruction of the *McNally* opinion is of national importance. To federal prosecutors of white collar crime, the wire and mail fraud statutes are "our Stradivarius, our Colt 45, our Louisville slugger, our Cuisinart—and our true love." J. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 Duq. L. Rev. 771 (1980). Citations to these statutes recur with unrivalled frequency in the great number of federal white collar crime indictments.[5] The scope of the statute is therefore of significant national importance.

In the 15 months since *McNally*, more than 75 appellate panels have discussed its proper interpretation. This Court itself almost immediately turned to the *McNally* issues in *Carpenter v. United States*, ___ U.S. ___, 108 S. Ct. 316 (1987). There the question addressed was whether the *Wall Street Journal*'s interest in its confidential information was a property right. This Court agreed with the lower courts that "[c]onfidential information has long been recognized as business property." 103 S. Ct. at 320.

No such status accrues to the government's political interest in its Buy American policies. The reach of the mail and wire fraud statutes in this respect warrants Supreme Court review before Petitioner Alfred Biberfeld begins a five year prison sentence and

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[5] When holding that *McNally* applied retroactively, the Court of Appeals for the Tenth Circuit, *en banc*, remarked on "the large number of cases in this circuit which are likely to be affected by these legal issues." *United States v. Shelton*, 848 F.2d 1485, 1488 (10th Cir. 1988).

hundreds of other cases grapple with the interpretation of *McNally*.

II. THE COURT OF APPEALS' DECISION CONTRADICTS THE DECISIONS OF OTHER COURTS OF APPEALS AND VIOLATES PETITIONER'S FIFTH AMENDMENT RIGHT OF "FAIR WARNING" OF A POTENTIAL CRIMINAL VIOLATION

A. The Panel Placed Exclusive Weight on the Words of the Contract Despite the Fact that Background Information Made Petitioners' Interpretation Reasonable as a Matter of Law

All 12 counts in this indictment pivot on the proposition that the Petitioners were obliged to disclose the subcontractors of a subcontractor on government bid forms. The Petitioners have presented substantial evidence that, when a government contract clause uses the word "subcontractors," it is a term of art that does not encompass subcontractors of subcontractors (so-called "second tier subcontractors"). The U.S. Court of Claims so held in *Schweigert, Inc. v. United States*, 388 F.2d 697 (Ct. Cl. 1967). Such second tier subcontractors would not normally be known to the bidder; they could not normally be controlled by the bidder (with whom they had no contractual privity); and they in turn would have subcontractors whose identification would lead, if not *ad infinitum*, at least a great distance down the industrial chain.

Consistent with *Schweigert* and its underlying rationale, the Petitioners presented numerous examples of standard government contracts clauses that, when they are intended to encompass second and third tier subcontractors, use the term "subcontractors at any tier" rather than simply using the word "subcon-

tractors."[6] Furthermore, the Petitioners presented testimony at trial from Professor Ralph Nash, a founder and faculty member of George Washington University's Government Contract Program, that he would interpret the word "subcontractors" in the government contracts clause in question to require only that the prime contractors' subcontractors be listed, and not its subcontractors' subcontractors. Tr. at 2181.[7]

In further support of their position, the Petitioners cited the decisions of those administrative entities entrusted with responsibility for implementing and overseeing the contract clause in question. The federal regulatory body that promulgates the regulations governing this clause (the FAR Council) had stated explicitly that the clause does not require the bidder to list lower tier subcontractors. Similarly, the U.S. General Accounting Office ("GAO"), which is the expert tribunal that had decided all of the 28 cases interpreting and applying the contract clause in question, has held that bidders in the Petitioners' position were free to provide supplemental information required by the clause *after the submission of bids.*

All these points were presented on appeal. Against them the trial court placed great weight, and the appellate court placed exclusive weight, first, on the fact that the clause in question called for disclosure of "plants where the work is to be performed" and permitted no change in place of performance without

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[6] *See* Trial Transcript ("Tr.") at 2102-03; Trial Exhibit D-163.

[7] The Petitioners in fact listed the Pakistani Company in question in their bids when that company was a first tier subcontractor. Tr. at 2483-84.

government consent; and second, that a contractual footnote provided that:

> Subcontractors for all significant cost items (e.g., major components, forgings, sub-assemblies) shall be listed. Where items of foreign origin are involved, it is essential that the countries in which the items are produced or manufactured be identified.

App. A-5.

From this the appellate panel concluded that the clause "unambiguously" required disclosure of even sub-subcontractors. App. A-6. The appellate panel did not address any of the background information or the precedent cited by the Petitioners. It concluded that the quoted language, simply as a matter of law, established the requirement that second tier subcontractors be disclosed. App. A-6 to A-7.

The cited text and footnote, however, are not unambiguous. They refer only to "subcontractors" and, while emphatic, they provide no instruction as to how that term is to be interpreted. Background information is essential to the construction of a contractual term like "subcontractors" and, as noted below, several appellate courts have held that it must be considered before a finding of criminal liability can be made or upheld.

B. The Crimes Charged in this Indictment Cannot Have Occurred in the Absence of Fair Warning of What was Required

In *McBoyle v. United States*, 283 U.S. 25 (1931), Justice Holmes articulated a basic rule of federal criminal statutory construction against the backdrop of the Fifth Amendment guarantee of due process of

law. In refusing to apply the statute penalizing automobile theft to an aircraft theft, he said:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world . . . of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

283 U.S. at 27.

Justice Holmes' deference to this principal with respect to a crime of an everyday character, has been especially vigorously emulated by the circuit courts of appeal in considering crimes involving intricate areas of government contracting and government regulation. Thus, in *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985), the Court of Appeals for the Fourth Circuit reversed a criminal prosecution for tax evasion, holding that:

> a determination that the prosecution theory . . . is "reasonable and well-supported" does not prove that "defendants' claim that they could not have known what the law required is frivolous." Defendants, too, advance a "reasonable and well-supported" reading of [the regulation].

762 F.2d at 364. Earlier, in *United States v. Race*, 632 F.2d 1114 (4th Cir. 1980), the same circuit reversed a criminal conviction arising from a Defense Department contract because the defendants advanced a reasonable rationale for their interpretation of the contract, a rationale rooted in practice and previous interpretation. The Court concluded that

"one cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract." 632 F.2d at 1120. The court continued:

> . . . whenever a defendant's statement or action under a contract accords with a reasonable construction of the enabling language of the contract, the Government will not have carried its burden of "negative[ing] any reasonable interpretation that would make the defendant's statement factually correct" and thus a conviction under § 1001 cannot stand under those circumstances.

632 F.2d at 1120. *Accord, United States v. Dahlstrom*, 713 F.2d 1423, 1427 (9th Cir. 1983), *cert denied*, 466 U.S. 980 (1984), and *United States v. Matthews*, 787 F.2d 38, 49 (2d Cir. 1986).

The Court of Appeals for the Third Circuit has circumvented this principle and the holdings of these other circuits by the simple expedient of not addressing the Petitioners' evidence and arguments. When the authoritative tribunals (the GAO and Court of Claims), a leading expert in government contract law, and the responsible governmental entity itself all declare that the law is as the the Petitioners believed it to be, it is not sufficient for the Court of Appeals to say simply that the contract is unambiguous without even addressing those collateral sources of information. This point is especially strong when the clause said to be unambiguous does not refer to the second tier subcontractors it is said to encompass.[8]

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[8] The Government has never presented the issue of the proper

CONCLUSION

This Petition for a Writ of Certiorari should be granted and the decision of the United States Court of Appeals for the Third Circuit should be reversed, or, in the alternative, the case should be set down for oral argument.

Dated:
September 16, 1988

Respectfully submitted,

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interpretation of the contract clause in question to those most expert in its interpretation. Rather than asserting a civil claim based on breach of contract or other ground that would have subjected its theory of prosecution to review by the U.S. Claims Court, the Boards of Contract Appeals or the GAO, the Government proceeded directly to indictment and criminal trial.

APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 87-57309

UNITED STATES OF AMERICA,
vs.
BIBERFELD, ALFRED G.
SURGICAL INSTRUMENT CO. OF AMERICA,
Appellants

On Appeal From The United States District Court
For the District of New Jersey (Trenton)
(D.C. Crim. No. 87-00081-1-1)
District Judge: Robert E. Cowen

Submitted Pursuant to Third Circuit Rule 12(6)
June 6, 1988
BEFORE: STAPLETON, GREENBERG, and ROSENN,
Circuit Judges

(Opinion filed June 16, 1988)

MEMORANDUM OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

Appellants Alfred G. Biberfeld and Surgical Instruments Company of America ("SICOA") were found guilty by a jury on each count of a twelve count indictment arising

out of transactions between SICOA and the United States Defense Logistics Agency ("DLA") and between SICOA and the United States Veterans Administration ("VA"). Count 1 charged the defendants with conspiring to defraud the DLA and VA by, *inter alia*, failing to reveal on their bids for contracts to supply these agencies with surgical instruments that the instruments would be made in part in Pakistan. Counts 2 through 5 charged defendants with wire fraud. Counts 6 through 10, the false statements counts, charged defendants with knowingly and wilfully falsifying, concealing and covering up in five separate contracts submitted to the DLA that the place of performance for the production of surgical instruments was Pakistan. Counts 11 and 12, the false claims counts, charged defendants will wilfully making and presenting false claims for payments under two separate DLA contracts.

Prior to trial, the defendants moved to suppress evidence obtained from SICOA's premises pursuant to a search warrant and claimed that they were entitled to an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). The district court denied defendants' motion. Defendants also moved unsuccessfully for a bill of particulars.

The Department of Defense ("DOD") and the VA procure surgical instruments through a competitive bid process. The DOD administers its bid process through the DLA. When the DLA requires surgical instruments, it issues solicitations to potential contractors specifying the item required and seeking various certifications. Thereafter, the DLA receives bid packages from various firms which it compares before awarding a contract.

Among the certifications required to be supplied by bidders are the country of origin of the instruments and a list of all places where work will be performed. This information is used to assess the competitive position of the bidder with respect to the Buy America Act preference.

This Act gives a preference to United States businesses and businesses in NATO countries as against firms supplying foreign goods. Moreover, information supplied in response to the place of performance clause is used to determine a firm's responsibility and its ability to meet the DLA's specific needs. In some instances, a pre-award survey of a firm and its subcontractors will be done before awarding a contract.

The VA procures surgical instruments in a similar fashion. Like the DLA, the VA requires the bidder to list each location where the product will be manufactured including all subcontractors. In certain instances, the VA will set aside contracts for small businesses ("set-aside contracts") in whole or in part. In a set-aside contract, the instruments supplied must be domestic items and thus, the VA will not consider foreign items.

The government's evidence showed that in 1979 Biberfeld made an arrangement for his wholly owned company, SICOA, to import from a West German company named Perfect Chirurgical Instruments ("Perfect") surgical instruments most of which had substantial work done on them in Pakistan.

Thereafter SICOA bid on and secured a number of DLA contracts to supply surgical instruments and performed them by using Perfect in West Germany to act as a conduit for instruments produced by a firm in Pakistan named G.T. Surgical Limited ("G.T."). Perfect marked the instruments "SICOA-stainless Germany" and delivered them to SICOA in the United States. SICOA inspected the instruments and supplied them to the DLA as if they had been produced in Germany.

With respect to the VA, defendants bid on one contract fur suture needle holders certifying that these instruments would be made in West Germany. Thereafter, defendants ordered finished instruments directly from G.T. in Pakistan requesting that G.T. mark the instruments "lightly." The

instruments were shipped by G.T. directly to SICOA in the United States. Defendants then erased the Pakistan markings and marked the instruments "Stainless Steel - SICOA - Germany" before sending these instruments to the VA.

On a second VA contract for forceps, part of which was a small business set-aside contract, SICOA bid in part as a "small business" and thus was required to manufacture this part of the contract in the United States. Defendants did in fact certify that SICOA in New Jersey would be the principal place of performance for these instruments. Nevertheless, defendants had G.T. send them finished, but unmarked instruments from Pakistan. Defendants telexed G.T. instructions to finish the instruments but to invoice them as "semi-finished instruments." Thereafter, the instruments by SICOA were marked and supplied to the VA.

I.

Counts 6 through 10 of the Indictment charged defendants with falsifying and concealing a material fact in five contracts with the DLA for surgical forceps in violation of 18 U.S.C. § 1001. Specifically, defendants were charged with knowingly concealing that the place of performance for the production of surgical instruments was G.T. in Pakistan. In each of their contract bids, defendants listed Perfect in West Germany as the place of performance. However, substantial, if not all, work was done for these contracts at G.T.

Clause K-39 in the DLA contracts provided, *inter alia*, as follows:

> K39 PLACE OF PERFORMANCE
>
> 1. Offerors must stipulate below the plant(s) where the work is to be performed, indicating the exact address(es) (Street, City, County, State)

thereof, name(s) and address(es) of the owner(s) and operator(s), the operation to be performed at such plants and the quantity of items to be manufactured at each plant. FAILURE TO FURNISH THE INFORMATION WITH THE BID MAY RESULT IN REJECTION OF THE BID.

* * *

CAUTION: No change in the place of performance shall be performed between the opening/closing date of offer and the award except where time permits and then only upon receipt of the Contracting Officer's written approval.

* * *

4. The performance of any of the work contracted for in any place other than that named in the offer and any resulting contract is prohibited unless the same is specifically approved in advance by the Contracting Officer.

* * *

6. The plant names and addresses including those of the subcontractors (1), the names and addresses of the owners or operators, the operation to be performed there and the quantity of items to be manufactured at each plant are listed below:

Footnote one to paragraph 6 provides that:

Subcontractors for all significant cost items (e.g., major components, forgings, sub-assemblies) shall be listed. Where items of foreign origin are involved, it is essential that the countries in which the items are produced or manufactured be identified.

Defendants moved for judgment of acquittal on Counts 6 through 10 arguing that (1) the "performance clause is

informational in nature [and] if for the purpose of aiding in assessing the responsibility of the bidder . . ., not for a determination of the responsiveness of the bid itself," (Appellants' Brief p. 16), and (2) the performance clause calls only for disclosure of "first tier" not "second tier" suppliers and, accordingly, the failure of defendants' bids to disclose the role of G.T. cannot be found to be false or misleading.

The trial judge denied the motions for acquittal concluding that clause K-39 unambiguously required a bidder, like defendants, to list in the DLA contract "every place where the work is being done, regardless of who it is being done [by], where it is being done, whether it is being done by him, by his sub[contractor] or by a sub[contractor] of his sub[contractor]." He also concluded that the place of performance was a material fact. He instructed the jury as follows:

> It is for you then to determine whether the information regarding the locations of the places where work was done on the instruments was falsified, concealed, or covered up by the defendants, whether the defendants knew that the information was falsified, concealed, or covered up, and whether the defendant acted knowingly and willfully.
>
> * * *
>
> If the defendants falsified, concealed, or covered up such information which I have found was required, they could not have acted willfully or intentionally if they did so as a result of good faith belief that it was not required.
>
> If you cannot find beyond a reasonable doubt that the defendants acted knowingly, willfully and intentionally in failing to disclose such informa-

> tion, the defendants must be found not guilty of the charges.

We agree with the district court that clause K-39, on its face, unambiguously requires disclosure of every place of performance and that this information was material. We further conclude that there is ample evidence from which the jury could conclude that the defendants' identification of Perfect and concealment of G.T. was not only misleading but knowingly, wilfully and intentionally so. The government introduced evidence showing that defendants did everything in their power, up to and including bribery, in order to conceal G.T.'s role in the production of the instruments. Accordingly, we conclude that the district court did not err in declining to enter judgments of acquittal on Counts 6 through 10.

II.

Defendants also contend that these convictions on Counts 2 through 5 cannot stand in light of the Supreme Court's decision in *McNally v. United States*, 107 S.Ct. 2875. We disagree.

Counts 2 through 5 charge the defendants with "divis[ing] a scheme and artifice to defraud and to obtain money from the United States by bidding on DLA and VA surgical instrument contracts using false representations, promises and omissions of material facts" and with executing this scheme by using wire communications. The goal of the scheme as alleged in the Indictment and as explained by the district judge to the jury, was to obtain government contracts by fraud and to thereby obtain money - i.e. contract payments - from the government by fraud. Accordingly, this is simply not a case in which the government alleged a scheme to defraud someone of intangible rights unrelated to money or property.

III.

Defendants' third argument attacks their convictions on Counts 1, 11 and 12, as to which they maintain judgments of acquittal should have been entered. As to Counts 11 and 12, the false claims counts, defendants contend that these claims were not made with knowledge of their falsity. With respect to the conspiracy count, it is said that there was no *scienter*. Both arguments rest on premises we have already rejected: i.e., the place of performance clause calls for disclosure of first tier suppliers only and there was no record basis for the jury finding that the defendants wilfully conspired to defraud and wilfully filed claims known to be false.

IV.

In support of their motion to suppress items seized in the search of SICOA's offices pursuant to a search warrant, defendants asserted in the district court that the affidavit supporting the warrant contained materially false statements. In particular, they claimed that the affidavit misrepresented in several respects what one Stewart Hamilton of T.G. Lillyman & Son Ltd. had told investigators. Defendants further asserted that obtaining an affidavit of Mr. Hamilton to demonstrate the falsities would be "logistically difficult."

The district court denied the motion to suppress without an evidentiary hearing, relying on the fact that defendants had submitted no affidavit and on the fact that the affidavit with the challenged material stricken remained sufficiently probative to demonstrate probable cause. We agree on both counts. With respect to the latter point, we note that the affidavit incorporates a report of an investigation of Perfect conducted by the chief prosecutor of the District Attorney's Office in Heidelberg, West Germany. That report reflects interviews with Perfect employees in which it is indicated that Perfect sells

instruments processed in Pakistan and that virtually no instrument processing went on at Perfect prior to August of 1983 when a new facility was opened. The prosecutor's report alone is more than sufficient to establish probable cause.

V.

We, like the district court, find the Indictment in this case quite particularized. Moreover, defendants have failed to persuade us that they suffered any prejudice from lack of the information that a bill of particulars would have provided. As a result, we cannot say that the trial judge abused his discretion in denying defendants' motion for a bill of particulars.

VI.

For the foregoing reasons, the judgments of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

_____

Circuit Judge

Dated:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5730

UNITED STATES OF AMERICA

vs.

BIBERFELD, ALFRED G.
SURGICAL INSTRUMENT CO. OF AMERICA,
Appellants

SUR PETITION FOR REHEARING
PRESENT: STAPLETON, GREENBERG, AND ROSENN,
Circuit Judges

The petitions for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having been asked for rehearing, the petition for rehearing is denied.

By the Court,

/s/ Walter Stapleton
Circuit Judge

Dated: August 12, 1988

EXCERPTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Robert E. Cowen, U.S.D.J.
v.	:	
	:	Criminal No. 87-81
ALFRED G. BIBERFELD and SURGICAL INSTRUMENT COMPANY OF AMERICA	:	

COURT'S CHARGE TO THE JURY

Andrew L. Rossner
Assistant U.S. Attorney; and
Terence P. Flynn
Assistant U.S. Attorney

Donald Horowitz, Esq.; and
Andrew R. Jacobs, Esq.,
Horowitz & Jacobs, Esqs.
Attorneys for Defendants

Scheme of Artifice to Defraud

I've said that the Government must prove, that the defendant participated in a scheme or artifice to defraud. What do I mean by a scheme or artifice to defraud?

The words "scheme" and "artifice" as used in wire fraud include any plan or course of action intented to deceive others, and to obtain, by false or fraudulent pretenses, representations or promises, money or property from persons so deceived.

A statement or representation is "false or fraudulent" within the meaning of this statute if it is made with reckless disregard as to whether it is true or false. Misrepresentations wilfully made without regard to whether they are true or false and put forth for the purpose of obtaining money from another, are as fraudulent as statements make with knowledge of their falsity.

Thus, a statement or representation is false or fraudulent if known to be unture or if made recklessly, without knowledge or care as to whether it is true or false.

Further, false or fraudulent representations may be made by statements or half truths or the concealment of material facts as well as affirmative statements or acts.

Intent to Defraud

To act with "intent to defraud" means to act knowingly and with specific intent to deceive, ordinarily for the purpose of either causing some financial loss to another, or bringing about some financing gain to oneself. Under the Wire Fraud Statute, reckless indifference to the truth is also considered fraudulent.

A person's intent is not ordinarily subject to proof in a direct way because there is no way of looking inside the operations of the human mind. you are advised that you may infer a defendant's intent from the surrounding circumstances and you may consider any statement made or not made or any act done or not done by a defendant as well as other facts and circumstances in evidence which indicates a defendant's state of mind and intent. However misleading or deceptive a plan may be, it is not fraudulent if carried out in good faith. A defendant has no burden to establish a defense of good faith. The burden is on the Government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.

Ladies and Gentlemen, as to the first element required to be proved in connection with the false statement, that the defendant falsified, concealed, or covered up a material fact in a matter within the jurisdiction of the Department of Defense, I have exercised my responsibility as the judge of the law to make some findings which you must accept. First, as stated earlier, I have determined that the contracts in question did call for the defendants to list all the places where work on the surgical instruments would be performed, whether by a supplier, contractor or subcontractor. Second, I have determined that the question of where work on these instruments would be performed was a material matter. Finally, I have determined that the question of where work on the instruments would be performed was within the jurisdiction of the Department of Defense.

It is for you, then, to determine whether the information regarding the locations of the places where work was done on the instruments was falsified, concealed or covered up by the defendants, whether the defendants knew that the information was falsified, concealed or covered up, and whether the defendant acted knowingly and wilfully. If the defendants falsified, concealed or covered up such information wich I have found was required, they could not have acted wilfully or intentionally if they did so as a result of a good faith belief that it was not required. If you cannot find beyond a reasonable doubt that the defendants acted knowingly, wilfully and intentionally in failing to disclose such information, the defendants must be found not guilty of the charges.

Supreme Court, U.S.
FILED
DEC 19 1988
JOSEPH F. SPANIOL, JR.

No. 88-472

In the Supreme Court of the United States

OCTOBER TERM, 1988

ALFRED G. BIBERFELD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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EDWARD S.G. DENNIS, JR.
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QUESTIONS PRESENTED

1. Whether, under *McNally* v. *United States*, No. 86-234 (June 24, 1987), petitioners, who obtained government contracts by means of fraudulent misrepresentations as to where the goods would be manufactured, were properly convicted of wire fraud.

2. Whether the court below correctly held that the government contracts at issue unambiguously required the submission of the information that petitioners misrepresented.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. A1-A9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1988. A rehearing petition was denied on August 12, 1988. The petition for a writ of certiorari was filed on September 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted on one count of conspiring to defraud the Defense Logistics Agency (DLA) and the Veterans Administration

(VA), in violation of 18 U.S.C. 371 (Count 1); four counts of wire fraud, in violation of 18 U.S.C. 1343 (Counts 2-5); five counts of making false statements in five separate contracts submitted to the DLA, in violation of 18 U.S.C. 1001 (Counts 6-10); and two counts of making false claims for payments under two separate DLA contracts, in violation of 18 U.S.C. 287 (Counts 11-12). Petitioner Biberfeld was sentenced to a total of five years' imprisonment[1] and was ordered to pay $84,000 in fines. Petitioner Surgical Instrument Company of America (SICOA) was fined a total of $50,000.[2]

1. The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. A2-A4), proved that petitioners devised a scheme to defraud the United States in connection with the sale of surgical instruments. Among other actions, petitioners omitted from their bids for VA and DLA contracts the fact that the surgical instruments they intended to sell the government would be manufactured in Pakistan, in violation of the Buy American Act, 41 U.S.C. 10a-10c.

The Department of Defense and the VA procure surgical instruments through competitive bidding. The Defense Department manages the bid process through the DLA. As the Defense Department requires surgical instruments, the DLA solicits bids from potential contractors,

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[1] Biberfeld was sentenced on each count as follows: Count 1, five years' imprisonment; Counts 2 through 4 and 6 through 12, five years' imprisonment, each sentence to run concurrently with each other and to the sentence on Count 1; Count 5, five years' imprisonment, which was suspended, and a three year period of probation to run consecutively to the sentence of five years' imprisonment.

[2] SICOA was ordered to pay $10,000 on each of Counts 1, 2, 6, 11, and 12, and was sentenced to pay a $10,000 concurrent fine on Counts 3, 4, 5, 7, 8, 9, and 10.

reviews and compares them, and then awards a contract. The VA purchases surgical instruments in a similar manner. Like the DLA, the VA requires bidders to list in their submissions each location where the product will be manufactured. A bidder must certify the country of origin of the goods the government seeks to purchase and list all places where work will be performed so that the DLA and the VA may determine the competitive position of the bidder under the Buy American Act, which gives a preference to United States businesses and to businesses located in NATO countries. In addition, the VA sets aside certain contracts for small businesses located in the United States. Incorrect or false certifications preclude a particular company from being awarded a contract. Pet. App. A2-A3.

In 1979, petitioner Biberfeld arranged for his wholly owned company, petitioner SICOA, to import from a West German company, Perfect Chirugical Instruments (Perfect), surgical instruments that were manufactured, for the most part, in Pakistan. Thereafter, SICOA obtained several DLA contracts to supply surgical instruments and used Perfect in West Germany as a conduit for instruments produced by a firm in Pakistan named G.T. Surgical Limited (G.T.). Perfect marked the instruments "SICOA-stainless Germany" and delivered them to petitioners in the United States. Petitioners inspected them and then delivered them to the DLA as if they had been produced in West Germany. Pet. App. A2-A3.

Similarly, petitioners obtained a VA contract for suture needle holders, certifying that the instruments would be made in West Germany. Petitioners ordered the finished instruments from G.T. in Pakistan, directing G.T. to stamp the instruments "lightly." Petitioners then erased the Pakistani markings and replaced them with the marking "Stainless Steel – SICOA – Germany" before sending

the instruments to the VA. Those instruments were shipped by G.T. directly to SICOA in the United States. Pet. App. A3-A4.

On a VA small business set-aside contract for forceps, SICOA bid in part as a "small business," and thus was required to manufacture a segment of the goods in the United States. Petitioners certified that SICOA's plant in New Jersey would be the principal manufacturing site for the instruments. Contrary to SICOA's representation, petitioners had G.T. send finished, but unmarked, instruments from Pakistan, instructing G.T. to list on the invoice that the instruments were "semi-finished instruments." Thereafter, petitioners marked the instruments and supplied them to the VA as SICOA instruments. Pet. App. A4.

The wire fraud counts in the indictment alleged schemes to defraud the DLA and the VA in the performance of their governmental functions by obstructing their procurement processes, thereby obtaining money under fraudulently obtained government contracts (Indictment 9, 21-22). On appeal, petitioners argued that their convictions should be reversed under this Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987), where the Court held that the mail fraud statute, 18 U.S.C. 1341, protects only property rights and not the intangible right of the citizenry to good government.

2. The court of appeals affirmed petitioners' convictions in an unpublished memorandum opinion. Pet. App. A1-A9. In particular, the court concluded (*id.* at A7) that *McNally* did not require reversal of the convictions on the wire fraud counts. The court explained that the goal of petitioners' scheme "was to obtain government contracts by fraud and to thereby obtain money—i.e. contract payments—from the government by fraud" (*ibid.*). Accordingly, the court explained, "this is simply not a case in

which the government alleged a scheme to defraud someone of intangible rights unrelated to money or property" (*ibid.*).

The court of appeals (Pet. App. A4-A7) also rejected petitioners' claim that the contract language was ambiguous and could be clarified only by extrinsic evidence. Like the district court, the court of appeals concluded that the contract, "on its face, unambiguously requires disclosure of every place of performance" (*id.* at A7). Indeed, the court of appeals stated, "[t]he government introduced evidence showing that defendants did everything in their power * * * to conceal G.T.'s role in the production of the instruments" (*ibid.*).

ARGUMENT

1. Petitioners renew their contention (Pet. 5-12) that their convictions on Counts 2 through 5 cannot stand in light of *McNally*. They claim (Pet. 8-9) that their scheme merely deprived the United States of an intangible political interest and therefore did not constitute fraud within the meaning of 18 U.S.C. 1343. The court of appeals correctly rejected that argument, finding this case distinguishable from *McNally*.

McNally involved a scheme in which the defendants, who controlled the selection of Kentucky's workers' compensation insurer, selected an agency that agreed to pay to the defendants a portion of the commissions it received from underwriting insurance companies. The defendants were charged and convicted of mail fraud on the theory that their scheme had deprived the citizens of Kentucky of their intangible right to honest government. Noting that "the Government now relies in part on the assertion that the petitioner obtained property by means of false representations," the Court concluded that the convictions

could not be upheld on that basis because "there was nothing in the jury charge that required such a finding" (slip op. 10-11).

In this case, by contrast, petitioners' scheme was a classic fraud through which petitioners used false representations and omissions of material facts in order to obtain money from the United States. As the court of appeals explained, the goal of the scheme, which was realized, "was to obtain government contracts by fraud and to thereby obtain money—i.e. contract payments—from the government by fraud" (Pet. App. A7). And, unlike in *McNally*, the jury here was instructed that a scheme to defraud "include[s] any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations or promises, money or property from persons so deceived" (*id.* at A12).

In any event, review by this Court is not warranted to resolve any question regarding the meaning of *McNally*. Congress recently amended the federal fraud statutes to provide that "the 'term scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right to honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603 (Nov. 18, 1988). The legislative history explains: "This section overturns *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17375 (daily ed. Nov. 10, 1988). Accordingly, the question whether the conviction in this case is inconsistent with *McNally* is an issue of diminishing importance.

2. Petitioners also claim (Pet. 12-16) that the contract language called only for disclosure of "first tier," and not "second tier," suppliers. According to petitioners, they had no "fair warning" (Pet. 12) that the failure to disclose the role of G.T., a second tier supplier, would subject them to criminal liability. As an initial matter, the meaning of a particular government contract does not merit

attention by this Court, at least in the absence of conflicting decisions as to the interpretation of the contract. In any event, petitioners' claim is devoid of merit.

As both courts below agreed, the contract is clear. It provides that bidders must specify where "work is to be performed," and states that "[t]he performance of any of the work contracted for in any place other than that named in the offer and any resulting contract is prohibited unless the same is specifically approved in advance by the Contracting Officer" (Pet. App. A4-A5). It further provides: "Subcontractors for all significant cost items (e.g., major components, forgings, subassemblies) shall be listed. Where items of foreign origin are involved, it is essential that the countries in which the items are produced or manufactured be identified." *Ibid.* As the district court found, "no rational or reasonable bidder or businessman can read * * * this contract without coming away from it with the feeling that the Government wants to know every place where the work is being done, regardless of who it is being done [by], where it is being done, whether it is being done by him, by his sub, or by a sub of his sub * * *. I do not believe that anyone reasonably can have any other interpretation * * *." C.A. App. 1952-1954. The court of appeals correctly affirmed the district court, finding that the contract "on its face, unambiguously requires disclosure of every place of performance" (Pet. App. A7).

Petitioners' efforts (Pet. 12-16) to find ambiguity by focusing on matters other than the plain language of the contract are not persuasive. Because the language of the contract is clear, petitioners get no benefit from a case such as *United States* v. *Race*, 632 F.2d 1114, 1120 (4th Cir. 1980), in which the court indicated that "one cannot be found guilty of false statement under contract * * * when his statement is within a reasonable construction of the contract." The court also held in *Race* that "[t]o be

ambiguous[,] a contract must be susceptible of at least two reasonable constructions" (*id.* at 1120). Here, both lower courts correctly found that the contract is not subject to two reasonable interpretations.[3]

Any doubt that petitioners failed to understand that the DLA and VA contracts meant what they said is dispelled by their own actions. As the court of appeals recounted, petitioners directed G.T. to mark certain instruments "lightly," so that they could erase that company's markings. In addition, petitioners had G.T. mislabel the invoice for other instruments in order to hide the fact that the instruments had been manufactured in Pakistan (Pet. App. A4-A5). It is clear, therefore, that petitioners "did everything in their power * * * to conceal G.T.'s role in the production of the instruments" (*id.* at A7) precisely because they understood that the contracts prohibited G.T. from playing that role.

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[3] Petitioners' reliance (Pet. 12-13) on *Schweigert, Inc.* v. *United States*, 388 F.2d 697 (Ct. Cl. 1967), to support their contention that "subcontractor" does not include second-tier subcontractors, is misplaced. That case involved the interpretation of a liquidated damages clause and the meaning of the term "subcontractor" in that particular clause (388 F.2d at 700). The issue was whether the contractor should be excused from paying liquidated damages for delay because the delay had been caused by a second-tier subcontractor (*ibid.*). The Court of Claims declined to hold the contractor responsible for the actions of the remote subcontractor, which it could not control or monitor (*ibid.*). No similar issue is presented here. And, as the district court stated, no rational businessman could read the contract at issue without concluding that the government wanted to know the identity of all subcontractors (Pet. App. A5).

Petitioners also make a general reference to General Accounting Office decisions (Pet. 13, 16). None of the decisions previously cited by petitioners to the court of appeals addresses the issues in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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DECEMBER 1988

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